IN THE SUPREME COURT OF MISSOURI

No. 87445

STATE EX REL. HOWARD J. VERWEIRE,

Petitioner,

v.

STEVEN MOORE, Superintendent,
Western Missouri Correctional Center,

Respondent.

Petitioner's Reply Brief

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I.

THERE IS NO PROCEDURAL IMPEDIMENT TO THIS COURT'S CONSIDERATION OF PETITIONER'S GATEWAY CLAIM OF ACTUAL INNOCENCE (REPLIES TO RESPONDENT'S ARGUMENTS I AND II).

Respondent's brief contends that there are two procedural impediments to this Court's consideration of petitioner's gateway claim of innocence under *Schlup v. Delo*, 513 U.S. 298 (1995). First, respondent suggests that the doctrine of judicial estoppel precludes the court from considering petitioner's claim of innocence. (Resp. br. at 7-9). Second, respondent contends that petitioner cannot meet the gateway innocence test because his evidence is not newly discovered. (*Id.* at 7, 9-10). Neither of these arguments has merit. Moreover, when this argument is considered in conjunction with one of the interrelated underlying claims for habeas relief, that there was an insufficient factual basis for petitioner's plea of guilty, these arguments border on the absurd.

According to respondent, judicial estoppel precludes this Court from even considering petitioner's compelling claim of innocence because the record of the guilty plea hearing contains conclusory references stating that petitioner and his trial attorneys discussed and understood the nature and elements of the crimes to which petitioner pleaded guilty. (*Id*. 7-8). A review of the guilty plea record, however,

reveals that there is not one scintilla of evidence to demonstrate that the trial court, petitioner, or his attorneys ever mentioned or discussed the dispositive issue of whether petitioner purposely attempted to cause serious physical injury to Alex Crompton. (Pet. App. at 4-43). As a result, there is absolutely no factual or legal basis for respondent's assertion that petitioner made statements under oath at the guilty plea proceeding that contradict any allegation currently before the court in this original habeas action.

Ironically, one of the cases cited by respondent in support of his judicial estoppel argument, *Collins v. Missouri Bar Plan*, 157 S.W.3d 726 (Mo. App. W.D. 2005), actually demonstrates that there is no basis for applying the estoppel doctrine to preclude consideration of petitioner's claim of innocence. In *Collins*, which involved a legal malpractice case based upon the plaintiff's lawyer's previous involvement in a parental rights case, the court of appeals held that the doctrine of judicial estoppel could not be invoked to bar the plaintiff's claims of malpractice based upon unelaborated statements that the plaintiffs made in a prior hearing that they consented to the adoption. *Id.* at 733. The court of appeals had little difficulty in rejecting the defendant's judicial estoppel argument in *Collins* in light of the fact that the plaintiffs' prior testimony did not contradict the plaintiffs' subsequent allegation of legal malpractice because although the "[plaintiffs] did consent to the

adoption, but, according to their allegations, their consent was based upon a mistaken belief." *Id*. at 733-734.

As in *Collins*, the basis for petitioner's claim of innocence and his interrelated claim that there was no factual basis for the plea, rests upon the fact that his admission of guilt rested upon the factual basis that he exhibited a gun in an angry and threatening manner against the victim, which rested upon his mistaken belief (planted in his mind by his ineffective lawyers) that these facts made him guilty of the crime of assault in the first degree, when in fact, they did not.

Respondent's judicial estoppel argument is, in essence, a permutation of respondent's prior argument advanced in his answer and return that a person who pleads guilty is estopped and categorically precluded from ever meeting the *Schlup* actual innocence test. (Resp. Ans. at 2-3; Resp. Ret. at 2). As is the case with his "estoppel by guilty plea" argument, respondent's judicial estoppel argument is foreclosed by this Court's decision in *Wilson v. State*, 813 S.W.2d 833 (Mo. banc 1991) and the Supreme Court's decision in *Bousley v. United States*, 523 U.S. 614 (1998). In fact, the *Bousley* decision explicitly forecloses respondent's argument because the United States Supreme Court remanded the case to allow *Bousley* to establish his gateway innocence of a federal fire arm offense in light of the fact that the record established that neither counsel, the court, nor the defendant understood one

of the essential elements of the crime. *Id.* at 618-619. Nowhere in the *Bousley* opinion does the Supreme Court even hint that a prisoner who pleads guilty is precluded from establishing his innocence to overcome a procedural default to his underlying claim that there was no factual basis for his plea of guilty. *Id.* at 623-624.

According to respondent, there is also a second procedural impediment to this Court's review of petitioner's gateway claim of innocence. Respondent contends that none of petitioner's evidence is "new." (Resp. br. at 7, 9-10). The decision in *Bousley*, as well as this Court's decision in *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003) both demonstrate that this argument is meritless. In *Amrine*, this Court emphatically rejected the tortured reasoning of the Eighth Circuit in *Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir. 2001) that limited the consideration of actual innocence claims to newly discovered evidence. 102 S.W.3d at 545. The appropriate inquiry, instead, requires reviewing courts to consider "all of the existing evidence of innocence." *Id*. Likewise, in *Bousley*, petitioner's claim of innocence, as here, rested solely upon the contention that the facts elicited during Bousley's guilty plea did not establish all of the elements of the crime under the federal firearms statute at issue. 523 U.S. at 623-624.

Moreover, as the outcome in *Bousley* amply demonstrates, the evidence here is "new" in the sense that none of the facts or related legal arguments demonstrating

that petitioner's conduct did not constitute the crime of assault in the first degree were brought to the trial court's attention during the guilty plea proceedings. *Id*. at 618-619; See also House v. Bell, 126 S.Ct. 2064, 2077 (2006) (defining "new" evidence as evidence "not presented at trial"). This appropriate definition of "new" evidence is underscored by the post-remand litigation in the *Schlup* case. None of the evidence submitted to the district court after remand in *Schlup* was new, in the sense that it could not have been discovered and presented at trial if Schlup had received competent representation. *Schlup v. Delo*, 912 F.Supp. 448 (E.D. Mo. 1995). In fact, one of the witnesses that Schlup presented to convince the court that he could meet the actual innocence test was a witness who had previously testified at trial. *Id*. at 554, n.6. In *Schlup*, Judge Hamilton subsequently found that Lloyd Schlup was entitled to habeas relief because his trial counsel was ineffective in failing to interview and call many of the same witnesses who previously testified in support of his gateway claim of innocence. *Schlup v. Bowersox*, 1996 WL 1570463 (E.D. Mo. 1996). If Lloyd Schlup's evidence of innocence had been required to be "new" as defined by respondent here, he would have been executed because it would have not been possible for Schlup's trial counsel to have been found ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to investigate and present the same evidence of innocence that was available to counsel at trial. *Id*. at 694. See

also *Reasonover v. Washington*, 60 F.Supp.2d 937, 947-949 & n.8 (E.D. Mo. 1999) (rejecting an identical argument made by Missouri's Attorney General).

Finally, both of the procedural roadblocks that respondent is raising to thwart review of petitioner's gateway claim of innocence should be rejected because erecting any procedural bar to a gateway claim of innocence would undermine and defeat the entire purpose of the manifest injustice test as articulated by both the Supreme Court and this Court. The gateway innocence test was crafted as the last safety valve for an innocent prisoner to obtain merits review of procedurally defaulted claims for relief. It defeats the purpose of the actual innocence test to impose some sort of procedural default upon a court's consideration and application of the actual innocence test. If a prisoner is innocent, he is entitled to habeas relief if he can prove his underlying conviction was unconstitutional regardless of any procedural infirmity in the case. *Murray v. Carrier*, 477 U.S. 478, 495-496 (1986).

II.

PETITIONER CAN MEET BOTH THE GATEWAY INNOCENCE TEST AND THE FREE STANDING INNOCENCE TEST. (REPLIES TO RESPONDENT'S ARGUMENTS II AND III).

In arguing that petitioner can meet neither the "gateway" nor the "freestanding" innocence test, respondent cites no authority to contradict petitioner's argument that

pointing a gun at a stranger in a threatening manner is insufficient to demonstrate that the defendant had the purpose to cause serious physical injury to the victim. *See State v. Whalen*, 49 S.W.3d 181, 187 n.5 (Mo. banc 2001). Instead, the only authority relied upon by respondent are two sufficiency of the evidence cases, *State v. White*, 798 S.W.2d 694 (Mo. banc 1990) and *In re J.R.N.*, 687 S.W.2d 655 (Mo. App. S.D. 1985). Petitioner believes he has amply demonstrated in his opening brief that both of these cases are undoubtedly distinguishable from this case. (Pet. br. at 22). Petitioner, in the interest of brevity, will not reiterate this discussion here.

However, certain passages from the *J.R.N.* decision actually bolster, rather than diminish, the substance of petitioner's claim of innocence. The court in *J.R.N.* notes that the Missouri attempt statute, § 564.011 R.S.Mo. (1979), and the committee comments accompanying its passage are based upon the Model Penal Code's definition of attempt. 687 S.W.2d at 656; § 564.011 V.A.M.S., Committee Comments (1973). Both the Model Penal Code and the committee comments noted above indicate that evidence is not sufficient to constitute a substantial step supporting an attempt to commit an offense unless "it is strongly corroborative of the actor's criminal purpose," Model Penal Code § 5.01(2)(1962). To be sufficient to meet the substantial step requirement, "the conduct must be indicative of the actor's purpose to complete the offense." *Id.*

The facts of this case fall woefully short of establishing that petitioner committed any act demonstrating that it was his purpose or intention to complete the assault by causing serious physical injury to Alex Crompton. Petitioner's conduct, thus, falls far short of the actions necessary to constitute a "substantial step" under language from both the committee comment and the Model Penal Code requiring strong corroborating evidence of criminal purpose.

To be found guilty of assault in the first degree based upon an allegation of an attempt to cause serious physical injury, it is petitioner's position that unless the defendant confesses, as the juvenile did in *J.R.N.*, that he had the purpose to cause serious physical injury to the victim, it is necessary in an assault in the first degree case involving a gun that the defendant pull the trigger in order to provide sufficient proof of an attempt to cause serious injury. *See e.g., State v. Mann*, 129 S.W.3d 462, 465-467 (Mo. App. S.D. 2004). Otherwise, as petitioner noted in his opening brief, every case of exhibiting a deadly weapon in an angry or threatening manner could be charged as the greater crime of assault in the first degree by an overzealous prosecutor.

In addition, none of the circumstantial factors listed in the Model Penal Code that are considered relevant evidence supporting a finding of a "substantial step" are present in this case. The factor that convinced the court to find the evidence sufficient

in *J.R.N.* was the defendant's confession, coupled with the fact that he sought out the contemplated victim of the crime, with whom he was acquainted, and went to his place of business with a weapon to perpetrate the assault. 687 S.W.2d at 656. This view is consistent with the Model Penal Code, which held that conduct consisting of "lying in wait, searching for or following the contemplated victim of the crime" may be considered as evidence supporting a substantial step toward the commission of the underlying crime. Model Penal Code, § 5.01(2)(a) (1962). In stark contrast, the facts of this case involve a spontaneous encounter in a public place between two strangers, in which a loaded gun was exhibited and angry words were exchanged.

As petitioner noted in earlier pleadings, there is no published Missouri case that has upheld an assault in the first degree conviction under facts even remotely similar to those presented here. However, the courts of other states have found similar evidence to be insufficient to sustain assault or attempted murder convictions under similar state statutes. *Riebel v. State*, 790 P.2d 1004, 1006 (Nev. 1990); *Merritt v. Commonwealth*, 164 Va. 653, 663 (1935).

Finally, respondent places great reliance upon the police statements of David Jones and Joel Naselroad, both of which contain vague references indicating that petitioner may have threatened to shoot the victim. Mr. Jones' statement to the police has been totally discredited. (Pet. App. at 105). In addition, Mr. Naselroad's cryptic

statement cannot be considered in this original writ proceeding because respondent did not present Naselroad's statement to any reviewing court in this action, failed to introduce this statement into evidence before the special master in the court of appeals below, and did not attach or refer to Naselroad's statement in his answer or return in the present original habeas action. (Resp. App. at 1). Therefore, this statement cannot be made part of the record of appeal in this action by respondent by appending it to his brief. *See* Rule 84.24(g); *State ex rel. Ford Motor Co. v. Westbrooke*, 12 S.W.3d 386, 391 (Mo. App. S.D. 2000). In fact, counsel for petitioner had never seen this statement prior to reading it in the appendix to respondent's brief because it was not provided to him in the packet of police reports he received when he undertook representation of petitioner in this matter.[1]

In any event, it does not matter whether or not these threatening statements were made by petitioner. Given the fact that none of the other witnesses in the case recall such a statement being made, including the victim, coupled with the testimony

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[1] It is indeed ironic that Missouri's Attorney General, who has championed the doctrine of procedural default in this and numerous other post-conviction actions, would fail to comply with a settled rule of appellate procedure. Under Rule 84.24(g) and *Westbrooke*, the Naselroad statement should be stricken from the record. (Resp. App. at 1).

of petitioner before the master and the substance of his voluntary confessions to the police, it is certainly more likely than not that a jury would have entertained a reasonable doubt that any such threats were made. More importantly, however, an idle and conditional threat made by someone pointing a gun at another falls woefully short of establishing a firm purpose to attempt to cause serious physical injury to the person being threatened. Assuming for the sake of argument that such threats were made, they were undoubtedly conditional threats made by petitioner in order to extricate himself from the situation and avoid a physical confrontation with Alex Crompton and his friends. This situation is not unlike the factual scenario this Court confronted in *State v. Sears*, 86 Mo. 169 (1885), in which a landowner threatened to shoot a trespasser unless he left his property. *Id*. at 171-175. Under either the *Schlup* or *Amrine* test, petitioner has amply demonstrated that he is actually innocent of the Class B felony of assault in the first degree.

III.

THERE IS CAUSE AND PREJUDICE TO OVERCOME ANY PROCEDURAL BAR TO MERITS REVIEW OF PETITIONER'S UNDERLYING CLAIMS FOR RELIEF.

Respondent advances two arguments in opposition to petitioner's claim that there is cause and prejudice to overcome the procedural default arising from his failure

to file a timely Rule 24.035 motion. First, respondent contends that petitioner's claim that the interplay between the then existing 90-day time limit for filing post-conviction motions and the 120-day call-back rule does not provide a sufficient external factor to establish cause and prejudice under *State ex rel. Simmons v. White*, 866 S.W.2d 443 (Mo. banc 1993). (Resp. br. at 18-19). The *Simmons* case does not foreclose a finding of cause in this case for two reasons. First, the *Simmons* decision was issued before this Court held that a Rule 91 petitioner can proceed if he can establish cause and prejudice under standards similar to those applied by the federal courts in actions pursuant to 28 U.S.C. § 2254. *See State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215-216 (Mo. banc 2002). Prior to the decision in *Jaynes*, this Court only allowed Rule 91 petitioners to proceed if they could meet the manifest injustice test. *See Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). The "Hobson's Choice" involving the interplay between the 120-day call back statute and the 90-day deadline of Rule 24.035 provides an external factor beyond petitioner's control sufficient to establish cause under the federal court standard. *See e.g., Murray v. Carrier*, 477 U.S. 478 , 488 (1986).

Secondly, even under the test of *Simmons*, it is clear that there is cause to overcome the procedural default here based upon uncontradicted evidence that the present grounds being advanced to support this Rule 91 petition were not known to

Mr. Verweire until he contacted and retained the undersigned counsel. (Pet. App. at 44). Thus, cause is established to overcome the procedural default under *Simmons* and *Brown v. Gammon*, 947 S.W.2d 437 (Mo. App. W.D. 1997). 866 S.W.2d at 446.

Respondent's second argument asserts that plea counsel's ineffectiveness cannot constitute cause because petitioner is only entitled to an effective lawyer during trial and direct appeal. (Resp. br. at 19). Citing the Eighth Circuit decisions in *Reese v. Delo*, 94 F.3d 1177 (8th Cir. 1996) and *Lowe-Bey v. Groose*, 28 F.3d 816 (8th Cir. 1994), respondent contends that cause cannot be established because the ineffectiveness of counsel issue advanced by petitioner regarding counsel's advice not to file a state post-conviction motion occurred in a post-conviction setting. (*Id*. at 19-20). Respondent's argument is refuted by the record. Petitioner is not alleging ineffective assistance of Rule 24.035 counsel. He could not possibly do so because he never filed a Rule 24.035 motion. The ineffective performance of counsel here occurred at or near the time petitioner was formally sentenced under the 120-day call back rule, a critical stage of the proceedings where the Sixth Amendment requires that a criminal defendant is entitled to the effective assistance of his counsel. *See e.g., Roe v. Flores-Ortega,* 528 U.S. 470, 482-483 (2000). Since respondent has never disputed the substance of petitioner's sworn affidavit, which sets forth several compelling reasons for establishing cause, and because the merits of the claim establish prejudice,

there is no procedural impediment to review of the merits of petitioner's claims for relief.

CONCLUSION

The balance of the issues were adequately addressed in petitioner's opening brief. WHEREFORE, for all the foregoing reasons, as well as those reasons advanced in his opening brief and in his underlying habeas petition, Mr. Verweire prays this Court to examine the evidence in this case and issue a writ of habeas corpus discharging him from his conviction for the offense of assault in the first degree and grant such other and further relief that the Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that:

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2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free.

3. That two copies of the foregoing brief, together with two digital copies, have been mailed by U.S. Mail, first class, postage pre-paid, to Andrew Hassell, Attorney General's Office, P.O. Box 899, Jefferson City, Missouri, 65102, this ___ day of July, 2006.

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Attorney for Petitioner